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REVISTA ROMÂNĂ DE ARBITRAJ

Arbitration with defaulting parties – a practical approach

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Abstract

Efficient arbitral proceedings need to be quick and are usually characterized by the parties' willingness to cooperate. However, more recently, there have been cases where one party was absolutely non-cooperative; despite appearances, this does not mean that it is going to be plain sailing for the arbitral tribunal nor for Claimant. Instead, both have to be careful not to commit any formal mistakes which may result in a challenge of the arbitral award. This article shall explore several questions in connection with this problem by taking into consideration the ICC Rules, the VIAC Rules and the arbitration rules of the Chamber of Commerce and Industry of Romania.

I. Background

The recent past has seen cases where Respondent failed to submit its advance on costs, the most essential step for the arbitral proceedings to be initiated. If it does not want the proceedings to be terminated before they even started, Claimant, therefore, also has to pay Respondent's share in the advance on costs as otherwise the arbitral tribunal will not become active.[1]

This problem is one of the many measures known as "Guerilla Tactics"; recently it has been a rather topical one[2] and the subject of various international symposia and conferences. It describes the lack of cooperation of one party or its absolute refusal to assume an active part in the proceedings.[3] In the following, we will take a closer look at how to deal with such a situation, particularly given the fact that both parties have undertaken a mutual obligation to arbitration when signing the arbitration agreement. It is further relevant to discuss this question with regard to the outcome of the proceedings as, in the end, the other party – usually Respondent – may raise objections due to the fact that it was not heard in the proceedings or for other formal irregularities. This may result in the arbitral award to be challenged or, even worse, not to be enforced pursuant to the regulations of national law[4] and of the applicable multilateral conventions such as the New York Convention or the European Convention. Let us now examine the consequences of default of parties in the various stages of arbitral proceedings and the risks that they bear.

II. The Early Stages of Proceedings

1. Failure to Submit Advance on Costs

If a statement of claims is filed with an ordinary court and Respondent does not react within the set time-limit, Claimant's writ, according to most procedural orders, is to be "accepted as true" and the competent court will issue either a payment order or a default judgement, depending on the amount in dispute. This means that Claimant then holds a title for its claims and – without further ado – may, in case of non-payment, initiate execution proceedings. This scenario entirely differs from arbitration: Arbitration is guided by the idea that the parties shall cooperate, with each party appointing one arbitrator, and shall

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[1] See also **Rohner/Lazopoulos**, *Respondent's refusal to pay its share of the advance on costs, Kluwer Law International, 2001, Vol 29/3, 551 et seq.*

[2] **Donahey,** *Defending the Arbitration against sabotage, Kluwer Law International,* 1996, Vol 13/1, 95 et seq.

submit an advance of costs amounting to half of the entire costs expected to incur in the proceedings.[5] If Respondent fails to submit its share, proceedings may be endangered right from the start. Most procedural laws or arbitration rules provide for Claimant to be entitled to pay Respondent's share as otherwise the claim is considered to be withdrawn and proceedings are suspended or terminated. The most essential sanction in case of failure to submit the advance of costs is, therefore, the arbitrators' right of refusal to become active unless full deposit has been made, or a termination of the proceedings.[6]

Pursuant to Art 34 para 4 of the Vienna Rules[7], Claimant is obliged to pay Respondent's share as well within 30 days as otherwise the claim shall not be dealt with any further, of which the parties shall be informed accordingly. The same applies in case an increase of the advance on costs becomes necessary in the course of proceedings. Also Art 36 para 2 of the ICC Rules[8] stipulates that the advance on costs as set forth by the tribunal is to be paid by both Claimant and Respondent in equal shares. If these costs are not paid, the Secretary General may – after checking with the tribunal – order the tribunal to suspend its activities; he may further set a deadline of 15 days. After this deadline has elapsed without any results, the claim is considered to be withdrawn. To avoid such consequences, the other party may pay the entire advance on costs. Appendix III Art 1 para 7 of the Rules facilitates this action insofar as the other party may pay the defaulting party's outstanding share by way of a bank guarantee. This, however, only offers temporary consolation as the bank guarantee will – sooner or later – be utilized to cover administration costs, arbitrators' fee and disbursements. Also in this case it all boils down to the fact that Claimant has to stake the entire advance on costs if the proceedings shall be continued.[9]

The Rules of Arbitration Procedure of the Court of Arbitration attached to the Chamber of Commerce and Industry of Romania (in the following "Romania Rules") take a different approach as regards costs: When filing its claim, Claimant must provide evidence that it has paid the registration fee. Pursuant to Art 31 para 1, it further has to pay the arbitration fees set forth by the Court of Arbitration Secretarial Office within ten days upon receipt of the notification deed, which include – among others – administrative costs and arbitrators' expenses. If neither notification nor arbitration fees are paid in due time and no respective proof of payment is submitted, proceedings are suspended.[10]

Any expenses incurring in connection with possible witness experts and translations shall be covered by an advance of costs submitted by the party requesting such steps. In case such measures are ordered ex officio, it shall be at the tribunal's discretion if and to what extent the parties shall submit an advance on costs.[11] The Rules do not provide for immediate sanctions in

[3] The problem of "*Guerrilla Tactics in Arbitration*" was one of the major items on the agenda of the Vienna Arbitration Days 2011. See also **Horvath,** *Guerrilla Tactics in Arbitration, An Ethical Battle,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Yearbook on International Arbitration 2011,* 297 et seq.; **Khvalei,** *Guerrilla Tactics in International Arbitration, Russian View,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Yearbook on International Arbitration 2011,* 225 et seq.; **Wilske,** *Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Yearbook on International Arbitration, 2011,* 315 et seq.

[4] See Art 36 Abs 1 lit a (ii) of the UNCITRAL Model Law on International Commercial Arbitration (1985, amended 2006). See further Art 7 of the Rules of Arbitration Procedure of the Court of Arbitration attached to the Chamber of Commerce and Industry of Romania.

[5] **Pitkowitz,** *Shared Funding of Arbitration Proceedings – Fact or Fiction,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Yearbook on International Arbitration 2011,* 31 et seq.

[6] **Fasching,** *Kostenvorschüsse zur Einleitung schiedsgerichtlicher Verfahren, JBl 1993,* 545.

[7] Rules of the Vienna International Arbitral Centre, http://portal.wko.at/wk/format_detail.wk?angid=1&stid=323813&dstid=347

[8] This article shall be based upon the ICC and ADR Rules 2012.

[9] Art 30 para 3 ICC-Rules; Art 34 para 4 Vienna Rules; **Bühler/Webster,** *Handbook of ICC Arbitration*[2], Art 30 para 3 ICC Rz 30-32 et seq.

[10] Art 31 para 3 as well as Art 35 para 5 Romania Rules; Art 10 of the Regulation on arbitration fees and expenses des Court of Arbitration attached to the Chamber of Commerce and Industry of Romania.

case of failure of payment, but Art 14 of the Regulation on Arbitration Fees and Expenses stipulates that rendering of the arbitral award may be suspended as long as the parties have not entirely fulfilled their payment obligations. If one party fails to do so, the other has the right to make payments on its behalf.

Another important aspect in this context concerns the question whether the party pre-financing the advance on cost is entitled to claims for compensation – by way of a partial award – against the defaulting party even before the final decision on costs is taken.[12] Art 37 para 3 of the ICC Rules states that the arbitral tribunal may *"at any time during the arbitral proceedings"* decide on costs and order payments. The Romania Rules do not contain any such regulation; Art 14 of the Regulation on Arbitration Fees and Expenses provides that the arbitral award shall determine the relevant amounts if one party has taken over payment obligations from the defaulting party.

Ad-hoc proceedings, on the other hand, mean that no arbitrators' agreement can be concluded with a defaulting party. Of course, if Claimant, i.e. the willing party, is presented with the draft of such an agreement, it can only rarely reject it as there is the additional risk of irritating the tribunal, which may refuse to deal with the case any further. Such agreements do not only regulate the fees of the arbitral tribunal but also the parties' obligation to submit a respective advance on costs. This means that also Claimant will usually – upon signing of the arbitrators' agreement – have to submit Respondent's share.

Unlike 20 years ago, nowadays a party's failure to submit its share in the advance on costs does only rarely have a negative effect on the other party in terms of "atmosphere" as arbitrators have to follow the principle of non-partiality. Professional arbitrators see such an act for what it is: a tactical move. Therefore, a failure to submit its share in the advance on costs does not mean that Respondent will lose the proceedings – as might have been the case in the past.

2. Delay in Appointment of Arbitrators

If Respondent fails to appoint an arbitrator of its own, a substitute needs to be found and installed by an official authority. In case proceedings are pending with an institutional arbitral court such as the Vienna International Arbitral Centre, the ICC or Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania, the institution will appoint an arbitrator. In case of ad-hoc proceedings such steps depend on the applicable national procedural law. In most procedural laws, the competent ordinary court would be called to nominate the substitute arbitrator.[13] As we can see, Respondent's decision not to assume an active role in the proceedings will not necessarily turn out to have a negative effect, but the actions it has failed to do will be done for it. In detail, the following regulations apply:

Pursuant to Art 14 para 3 of the Vienna Rules the Board shall decide on a sole arbitrator if the parties cannot reach an agreement. The same shall apply in case Respondent opts against assuming an active role in the proceedings. Art 14 para 4 stipulates that the Board shall also appoint a party's arbitrator if the party itself fails to do so within 30 days after service of the request. Art 12 of the ICC Rules contains similar provisions: It is up to the ICC Court to take such decisions if the parties fail to do so themselves; the

[11] Art 11 Regulation on arbitration fees and expenses of the Romania Rules.

[12] **Hausmaninger** in **Fasching/Konecny**[2] § 609 ACCP, Rn 42; **Hahnkamper** in **Torggler,** *Praxishandbuch Schiedsgerichtsbarkeit,* Rz 58, **Baier,** *Kosten und Kostenvorschuss im derzeitigen und künftigen österreichischen Recht, SchiedsVZ* 2006, 85; *Riegler* in **Riegler/Petsche/Fremuth-Wolf/Platte/Liebsche,** *Arbitration Law of Austria, Practice and Procedure (2007)* § 609 Rz 10; **Schwarz/ Konrad,** *The Vienna Rules (2009)* 34-039; **Tamminen,** *The Obligation to Pay the Advance on Costs under the Vienna Rules and Austrian Law,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Arbitration Yearbook 2009,* 281; **Pitkowitz,** *Shared Funding of Arbitration Proceedings – Fact or Fiction,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Yearbook on International Arbitration 2011,* 31 with further citations.

[13] See also the provisions of section 587 para 2 of the Austria Code of Civil Procedure.

deadline for appointments or notification is only set with 15 days. Art 17 of the Romania Rules contains the general provision that the arbitrators shall not be appointed by the parties but by the *appointing authority,* i.e. a member of the arbitral court who is commissioned with this task for seven years.[14] This authority selects the arbitrator(s) from an arbitrators' list available at the Court, taking into consideration professional qualification and experience in relation to the complexity of the case and amount in dispute. As we can see, the common institutional arbitral rules take *de facto* measures to avoid a "boycott" of the proceedings in their initial stages.

When it comes to ad-hoc proceedings, substitute appointments may be a bit trickier: The UNCITRAL Model Law contains a regulation applicable in cases where a party fails to appoint an arbitrator, and states that an authority within the national legal framework (e.g. a national court or any other authority such as the national Bar Association) may take appropriate measures upon request by the parties. [15]

3. Non-Submission of a Statement in Reply

As soon as the arbitral tribunal has been constituted, proceedings are initiated by way of ordering Respondent to submit its statement in reply. Even if it should fail to do so or not react at all, the tribunal shall open the proceedings in order to decide upon the claims raised (often in the form of an oral hearing including hearing of witnesses and examining submitted documents).

According to Art 10 of the Vienna Rules, the statement of claims is to be served – together with the order to submit a statement in reply – within 30 days by the Secretary General. A submission of the statement in reply does not constitute a prerequisite for continuation of proceedings: Pursuant to Art 12, the file is to be transferred to the tribunal upon receipt of the statement of claims (submitted in due form), effective appointment of all arbitrators and entire deposit of the advance on costs. Proceedings are to be continued in accordance with Art 20 para 6: *"If one party does not take part in the proceedings, the case must be heard with the other party alone."*

Also Art 4 para 5 of the ICC Rules stipulates that the statement of claims is to be served to Respondent by the Secretary and not by the tribunal. If Respondent fails to submit a statement of reply within 30 days, Art 6 para 3 shall apply. Proceedings are to be continued and the case is to be dealt with by the tribunal. Art 6 para 7 of the ICC Rules expressly states: *"If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure."* If one party does not sign the "Terms of Reference" or refuses to be involved therein, the terms are submitted to the arbitral institution for further approval and proceedings continue pursuant to Art 23 para 3 as soon as the Terms of Reference have been approved of by the arbitral court.

In a similar approach, also the Romania Rules determine that it is the administrative organ, in this case the Court of Arbitration Secretarial Office, and not the tribunal itself that is in charge of serving the statement of claims.[16] It has to be noted that the statement of claims is also understood to be served if recipient refuses acceptance or if the letter is not picked up from the post office. The statement of reply has to be submitted *"under penalty of extinction"* at the latest five days before the first hearing is scheduled.[17] In case a – formally summoned – party does not appear before the tribunal, this does in no way impede proceedings unless the respective party has filed a well-reasoned request for case continuation on the day before the hearing at the latest and has also informed the other party accordingly. The Romania Rules clearly forbid further "procrastination" by establishing that such a request may only be filed once in the course

[14] Art 11 para 2 Rules on the organization and operation of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania.
[15] Art 11 Abs 4 and Art 6 UNCITRAL Model Law.
[16] Art 33 Romania Rules.

of proceedings.

As regards ad-hoc proceedings, Art 25 UNCITRAL Model Law also states that proceedings shall be continued even if one party is in default but also points out that this default shall not represent a reason to accept Claimant's statement to be true. If Respondent fails to submit its reply, the tribunal shall – as detailed below – try Claimant's case and claims and shall also gather evidence. As this default clause represents non-mandatory law, theoretically – and based upon a mutual party agreement – also a "judgement in absence" may be rendered in case one party is in default.

Excursus: Non-Conclusion of an Arbitrators' Agreement by Respondent – Consequences for the Proceedings

The above discussed items mainly concerned institutional arbitration, there is an additional problem, however, as concerns ad-hoc proceedings: Most of the administrative "frame-work" such as arbitrators' fees, a possible limitation of liability[18] as well as the arbitrators' rights and obligations are regulated in the respective arbitral rules, however, ad-hoc proceedings lack such explicit provisions. As concerns ad-hoc proceedings, a separate arbitrators' agreement – governed by private law – must be concluded.[19]

By conclusion of such an agreement, arbitrators automatically assume private law obligations and rights and agree on their scope and limitations with the parties.[20] Besides the essentialia negotii including the arbitrators' impartiality, such an agreement may also contain the parties' obligation to submit an advance on costs as well as the arbitrators' possible liability limitations, their right to rescind from the agreement, termination regulations and their obligation to disclose information and invoices.[21] In addition, such agreements almost all of the time also include detailed rules of procedure.

If a party decides to "boycott" proceedings by way of non-involvement, it "naturally" does not sign any arbitrators' agreement, which means that any regulations contained therein shall not apply for that party. There is a possibility for the tribunal to set a formal deadline for acceptance of the agreement; in case such a time-limit elapses, it is, however, highly doubtful whether the agreement may be considered accepted. Personally, I think such a fiction to be highly risky and also based on my experience with the Austrian legal system I do not deem such a unilateral decision to be very wise as this may lead the defaulting party to object the tribunal's competence and to challenge the award.

Such unilateral acts are also highly problematic as regards the arbitrators' fees and limitation of liability. Even though, according to most laws, an arbitrator would be entitled to an "appropriate" remuneration, there is a strong risk that any regulations on fees that are set forth in a "unilateral" draft of the agreement cannot be made unilaterally if they exceed the limit that is considered to be appropriate. The same is true of liability limitations, which only become binding if agreed upon with both parties. In any case, it is more than questionable if such agreements are actually binding – as they were only agreed upon with one party – given the fact that the arbitrators' agreement is seen as an inseparable contract and that the arbitrators

[17] Art 47 para 2 Romania Rules.

[18] For arbitrators' liability see **Riegler/Platte,** *Arbitrator 's liability*, in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Arbitration Yearbook 2007,* 105 et seq.

As to the Austrian law, see OGH 2.10.2003, 6 Ob 41/03b, JBI 2004, 387; OGH 28.04.1998, 1 Ob 253/97f, SZ 71/76; **Fasching,** *Schiedsverfahren* 68; **Zeiler,** *Schiedsverfahren* § 587 Rz 51.

[19] **Zeiler,** Schiedsverfahren § 587 Rz 56.

[20] **Zeiler,** Schiedsverfahren § 587 Rz 53.

[21] See also **Zeiler,** *Schiedsverfahren,* § 587 Rz 58; **Matscher,** *Probleme der Schiedsgerichtsbarkeit im österreichischen Recht, JBl 1975,* 458; **Krejci,** *Zur Schiedsrichterhaftung, ÖJZ 9/2007,* 93 et seq.; liability limitations are a sensible part of the agreement, reaching beyond the main items and, therefore, have to be agreed upon separately; see also **Hausmaninger** in *Fasching/Konecny*[2] § 587 ACCP, Rz 201.

are obliged to remain impartial and treat both parties equally. Personally, I would rather refrain from such unilateral measures. [22]

III. Non-Involvement during Proceedings

The troubles continue if Respondent also keeps on "playing dead" in the course of proceedings. As already mentioned, the tribunal shall – in such a case – continue proceedings with Claimant only. All arbitral rules presented in this essay stipulate similar provisions, but things may sound simpler than they are:

Even at first glance it becomes clear that the rules do not intend for the defaulting party to be completely ignored.

Art 20 of the Vienna Rules provides for the proceedings to be organized at the tribunal's discretion, in accordance with the principle of non-discrimination of the parties and *"the right to be heard being ensured"*. Art 20 para 6 of the Vienna Rules stipulates – albeit in few words – that in case one party is not actively involved in the proceedings *"the case must be heard with the other party alone"*. The principle of non-discrimination of either party shall, however, apply *"at every stage of the proceedings"*. The tribunal is further entitled to declare motions or submission of evidence only admissible in certain stages of proceedings and if they are *"subject to advance notice"*. An oral hearing is scheduled *"at the request of one party"* or if the tribunal deems such action to be appropriate. The parties are to be given the chance to be informed about the other party's motions and the outcome of a gathering of evidence and to comment on any such actions. Only if the parties have had sufficient chance to submit evidence, name witnesses or make statements, the tribunal may – at its discretion – close proceedings and render an award.

Pursuant to Art 22 ICC Rules, proceedings are to be held *"in an expeditous and cost-effective manner"*; in order to guarantee an efficient organisation of proceedings, any and all procedural measures are to be taken that are deemed necessary by the tribunal *"after consulting the parties"* unless such measures would contradict the parties' agreement (Art 22, para 1 and 2).

"In all cases" the tribunal shall act fair and independently and shall further secure that each party is given sufficient chance to bring forward its point of view (Art 22, para 4). Also according to the ICC Rules, an oral hearing is only scheduled upon request of the parties or upon decision by the tribunal itself (Art 25, para 2). Pursuant to Article 25 Abs 5 the arbitral tribunal may summon any party to provide additional evidence at any time during the proceedings. The oral hearing shall – in accordance with Art 26 para 2 – take place with that party showing up for the hearing and if the other party, although duly summoned, fails to be present without giving reasons for its absence. Persons not involved in the proceedings shall not be admitted without prior consent by the tribunal and the parties (Art 26 para 4). The tribunal shall declare proceedings to be terminated as soon as possible after the last oral hearing or the filing of the last authorized submissions concerning such matters.

Art 10 of the Romania Rules obliges both parties to cooperate with the arbitral tribunal in order to ensure the completion of proceedings within the deadline set forth. On the other hand, Art 7 obliges the tribunal to be compliant with the rights of defence and the principle of contradictoriality throughout the entire arbitration proceedings under pain of nullity. The parties are entitled to attend the case debates; the presence of other persons is only admissible after prior consent of the tribunal and the parties (Art 57). In case both parties miss an oral hearing, the tribunal is – in accordance with Art 56 – entitled to render an arbitral award unless it deems the parties' presence or certain evidence necessary. As regards the gathering of evidence, Art 59 para 2 stipulates that the tribunal may require both written explanation from the parties and

[22] **Bühler/Webster,** *Handbook of ICC Arbitration*[2], Art 21, Rz 21-5 et seq.; **Derains/Schwartz,** *Guide to the ICC Rules of Arbitration, 2005,* 287.

any legally envisaged evidence. The oral hearing is only to be closed if the tribunal is convinced that all case circumstances have been sufficiently clarified (Art 67 para 1).

What does this mean in more detail in a scenario where one party – usually Respondent – does not take part at all?

Basically, that the tribunal may organize proceedings at its own discretion and may therefore also set forth deadlines, appointments and dates until which – upon preclusion – statements and evidence may be submitted ("cut-off-dates"). Any such steps, however, shall also be communicated to the defaulting party, which is further to be informed about the proceedings, about any motion and evidence submitted by opponent and about the outcome of the gathering of evidence. The defaulting party shall further be given the chance to react to any such measures and to catch up on previous actions it has failed to take. It is, therefore, crucial that Respondent is – despite its default – informed about all stages of the proceedings. It shall further have the chance to join the proceedings at any time. Respondent shall thus be sent protocols of the oral hearings and the gathering of evidence, even though it deliberately chose to refrain from participating therein, and be informed about any new motion, change to the statement of claims or restriction thereto and new legal questions. Respondent shall further have the chance to react to any such measures. The right to be heard as well as a right to fairness and non-discrimination shall safeguard all arbitration proceedings and are not to be violated, even in case of a defaulting party.

Also if the tribunal intends to apply new procedural management techniques in the course of proceedings, or to appoint a witness expert, extend one of Claimant's deadlines, render a partial award, order the submission of written expert witness statements, order to shorten writs (either regarding actual length or content) or schedule telephone or video conferences, both Claimant and (defaulting) Respondent are to be informed accordingly. Such notifications shall, however, not aid Respondent's intentions to "block" proceedings by its default. It is, therefore, admissible to set dead-lines until which writs are to be submitted, to preclude the submission of evidence and statements and to set time-limits for a concluding statement. The tribunal may also organize proceedings more "tightly" and efficiently and, usually, the outcome of the gathering of evidence will – as the other party has opted not to take part in the proceedings – be practically dominated by Claimant. Once more, however, it must be pointed out that Respondent shall not be completely ignored nor shall the tribunal solely focus on Claimant. On the contrary, the tribunal has to deal with every aspect of the case even though this may seem tedious. The tribunal itself shall take on any doubt and order Claimant to clarify it.[23] Generally the tribunal is advised – pursuant to Art 20 para 8 Vienna Rules – to notify the parties if they have acted in a way that is to be interpreted as a default. This warning system allows the defaulting party – at least in theory – to apologize for its default.[24]

A crucial point is the organisation of the oral hearing: Just to make sure, the tribunal is advised to schedule an oral hearing[25] also without prior request by Claimant as this means that Respondent can later raise no objections nor allege that the tribunal has favoured Claimant in its organisation of proceedings. During such a hearing, the tribunal has to make sure that Claimant's point of view is not – without having been checked – automatically taken as a basis for the entire case; instead, the tribunal shall question and evaluate all evidence submitted.

Another word of advice concerns new motions and a change of the legal arguments resulting from that

[23] **Hahnkamper** in **Torggler, Praxishandbuch Schiedsgerichtsbarkeit, 2007,** Rn 48; **Fasching, Schiedsgericht und Schiedsverfahren im österreichischen und internationalen Recht,** 104.

[24] **Schwarz/Konrad,** *The Vienna Rules, 2009,* Art 20 Abs 6, Rz 20-270.

[25] **Molitoris/Abt,** *Oral Hearings and the Taking of Evidence in International Arbitration,* in ***Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,*** *Austrian Arbitration Yearbook 2009,* 175 et seq.

hearing. In such a case, the tribunal shall grant Respondent the possibility to react to these changes within due time. Such a deadline shall not be as long as to effectively slow down proceedings but shall neither be understood as a mere phantom act; instead is shall be set forth considering the principles of fairness and equality.

In conclusion, this means (i) that the tribunal shall continue proceedings with the compliant party – usually Claimant – quickly and efficiently and that (ii) it shall not deny to the defaulting party its right to be heard.[26] The tribunal shall "hear" the case most comprehensively and shall then, upon submission of all relevant evidence, take its decision. The statement of claims shall, in any case, not form the basis for an arbitral award without even initiating a gathering of evidence. Any decision that is rendered in case of absence and non-involvement of the defaulting party, shall take into consideration the entire case.[27] In particular, the tribunal shall not interpret the non-involvement of the defaulting party to be a confession, something that is expressly stated in the Romania Rules (regarding the instruction of Respondent): *"The failure to file a reply to the claim shall not be deemed as a recognition of the claimant's claim"*[28]. A judgement in absence as immediate consequence of a party's default is therefore generally not consistent with the idea of arbitration, which follows the principles of consent and solution of conflicts. Both the Vienna Rules and the Romania Rules reflect these international standards.[29]

IV. Possible Consequences of the Parties' Lack of Involvement

Anyone who has been in the situation will know the feeling: Going through the proceedings with only one party is not the ideal scenario and does not create a smooth atmosphere. It may, on the contrary, indeed affect the ease and efficiency usually linked to arbitration, in particular if any administrative decisions – such as witness examination, form of the protocol or the simple question of serving of documents turn into tedious formal challenge. This is also due to the fact that there is no chance for a procedural agreement between the parties, so the tribunal always has to be on the safe side. But does the tribunal not exaggerate when treating the defaulting party – usually Respondent – with "velvet gloves"? Or to put it even more frankly: Why does the tribunal have to put up with that?

The answer is quite clear: The motivation behind such actions is to minimize the risk that the award is not enforceable or is later challenged.

Pursuant to Art 36 UNCITRAL Model Law, an award cannot be recognized or enforced if the party against whom the award is invoked was not given proper notice of arbitral proceedings or was otherwise unable to present its case. Recognition or enforcement may further be refused if such actions would be contrary to the public order of the respective state.

The Austrian Code of Civil Procedure (ACCP) and in particular section 611 para 1 Z 2 closely follows the Model Law as it states that there is sufficient reason for the annulment of an award if *"if one party has not been sufficiently informed about the proceedings or has not been able to use its attacking or defence mechanism for any other reason."* According to these provisions, an award is to be annulled if it is based upon facts that only became evident throughout the course of the proceedings and which the other party has not been informed about.[30] As we all know, the right to be heard is one of the basic principles of arbitral proceedings and means that the parties shall be given enough chances to bring forward any and all aspects that they deem relevant, otherwise "the right to be heard shall cease".[31] Accordingly, also documents and information

[26] **Platte** in **Riegler/Petsche/Fremuth-Wolf/Platte/Liebsche,** *Arbitration Law of Austria, Practice and Procedure (2007) § 600,* Rz 21 et seq.
[27] **Schwarz/Konrad,** *The Vienna Rules, 2009,* Art 20 Abs 6, Rz 20-268; **Lachmann,** *Handbuch für die Schiedsgerichtsbarkeit,* Rz 1650 et seq.
[28] Art 29 Abs 2 lit e Romania Rules.
[29] **Schwarz/Konrad,** *The Vienna Rules, 2009,* Art 20 Abs 6, Rz 20-260.

issued by the arbitral tribunal shall always be passed on to the other party as any default in this sense would pose a violation of the right to be heard. [32]

We must, however, also consider that according to numerous Austrian Supreme Court decisions, an annulment of an award due to a violation of the right to be heard shall only be admissible if this right was denied *altogether* and not just partially.[33] This right, for example, does not guarantee that the parties must be heard by all arbitrators.[34] There is no case of a violation if the tribunal has followed the regulations agreed upon, for example in connection with the method of how to serve a formal summon.[35] Further, it is not possible to claim any such violation if the essential rules of the proceedings have been abided by.[36] Consequently, the tribunal is entitled to continue with the procedure as agreed upon and need not worry that one party's non-involvement may lead to the annulment of the award.

Section 611 para 1 Z 5 ACCP states that an award is to be annulled if *"the proceedings have been organized in a way which contradicts the principles of Austrian ordre public."* Usually a violation of the right to be heard is seen as a violation of the procedural ordre public.[37]

Even if the deadline for challenging an award has expired according to national law,[38] there may still be danger ahead:

The New York Convention regarding the Recognition and Enforcement of Foreign Arbitral Awards denies recognition of an award if the party, against which the award is directed, has not been duly informed about the appointment of the arbitrators or the proceedings or if it has – for any other reason – not been able to duly present its case as it was denied to use its attack or defence methods. This means that the defaulting party may still raise objections against the award – though it may have abstained from challenging the award itself – during the enforcement proceedings, if such enforcement proceedings are pending in a state different from the one in which the award was rendered. Objections may be based upon the allegations that the party did not have the right to be duly heard and did not have a "due process" as set forth in Art V para 1 lit b of the New York Convention.[39] Such an objection may actually be successful if the right to equal treatment of the parties or the right to be heard have been violated – though court decisions hereunto are quite restrictive.[40]

It is, however, generally considered to be a prerequisite for a potential violation that such an act has critically influenced the outcome of the proceedings.[41] Such objections may therefore only be successful if it is proven that one party has effectively been hindered to participate or defend itself in the proceedings.[42] The right to be heard is understood to be violated if one party has not been informed about the identity of the arbitrators[43] or about opponent's

[30] OGH 12.5.1961, 2 Ob 199/61, OGH 24.09.1981, 7 Ob623/81; 06.09.1990 6 Ob572/90. See also **Pitkowitz,** *Die Aufhebung von Schiedssprüchen, 2008,* Rz 199. See in particular also **Pitkowitz,** *Digest of Austrian Case Law on Setting Aside Arbitral Awards 1895-2007,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Arbitration Yearbook 2008,* 433, 436 et seq.; **Pitkowitz,** *Setting Aside Arbitral Awards under the New Austria Arbitration Act,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Arbitration Yearbook 2007,* 231, 233ff; **Power,** *The Austrian Arbitration Act, 2006,* 114.

[31] OGH 12.5.1961, 2 Ob 199/61.

[32] OGH 17.11.1981, 5 Ob 710/81.

[33] OGH 18.12.2002, 7 Ob 265/02z. For a detailed overview see **Pitkowitz,** *Die Aufhebung von Schiedssprüchen, 2008,* Rz 195 et seq. For reasons why the right to be heard in arbitration needs fewer prerequisites than in national ordinary court proceedings see **Reiner,** ZfRV, 2003, 59.

[34] OGH 13.1.1955, 2 Ob 422/54.

[35] OGH 4.5.1928, 4 Ob 80/28.

[36] OGH 9.5.1978, 5 Ob 580/78.

[37] OGH 24.7.1997, 6 Ob 186/97i.

[38] According to section 611 para 4 ACCP this deadline is set with three months in Austria.

[39] **Steindl** in **Torggler,** *Praxishandbuch Schiedsgerichtsbarkeit,* 260; **Hausmaninger** in *Fasching/Konecny*[2] § 611 ACCP, Rz 55.

[40] **Steindl** in **Torggler,** *Praxishandbuch Schiedsgerichtsbarkeit,* 260.

arguments[44] or if a crucial document has been submitted without informing the other party nor giving it the chance to comment on it.[45]

On the other hand, the New York Convention states that the mere fact that an arbitrator has been appointed by one party only[46] – in most cases by Claimant – or that Respondent has not taken part in the proceedings, which is why an "ex parte-award" has been rendered, does not constitute an obstacle to the enforcement of the award if the tribunal acted in good faith and has given the defaulting party enough chances to submit statements or comments.[47] In case the tribunal does not abide by these rules, the tide may turn. Respondent may therefore choose to "play dead" deliberately and for tactical reasons, just in order to raise objections at a later stage. In order to avoid any such consequences, the tribunal has to make sure to continuously involve the defaulting party in the proceedings.

Art IX of the European Convention[48] comprehensively[49] lists several reasons for annulment which may form a precondition for a denial of recognition or enforcement.[50] These reasons basically resemble the provisions regarding the recognition and enforcement of awards stipulated in Art V para 1 lit a-d New York Convention. In particular, Art IX para 1 lit b deals with the violation of the right to be heard.[51] If two parties have ratified the New York Convention and are now parties in arbitral proceedings, Art IX para 2 states that any reasons for annulment not listed in Art IX para 1 New York Convention shall not be admissible.[52]

In conclusion, we can say that any reasons for an annulment of an arbitral award as well as any reasons that oppose international enforcement thereof can be considered as "final proof" and "ultimate standard" to decide whether the arbitral tribunal has properly conducted the proceedings despite the default of one party.

V. Checklist for Arbitrators

But what is such a "proper conduct" if the proceedings also involve a defaulting party? I have put together the following aspects – as with any legal checklist, obviously, with no claim to completeness – which may serve as a guideline in order to guarantee and secure the spirit of arbitration (promptness, efficiency and professionalism) in such proceedings.

- First, the tribunal must check most accurately and independently whether there is a legally binding arbitration agreement.
- The non-participation of a party must not be interpreted to represent a concession to Claimant's claims.
- The tribunal shall guarantee the right to be heard in all and any stages of the proceedings.
- The Chairman of the tribunal may, therefore, try to contact the defaulting party or its representative – after prior consent by the other party – via email or telephone in order to inform them about scheduled dates or to include them into a telephone conference.

[41] Appellationsgericht Basel-Stadt 27.2.1989, YCA XVII, 1992,583.
[42] OLG Hamburg 26.1.1989, YCA XVII, 1992,496f; Basler Obergericht 3.6.1971, YCA IV, 1979,310f; Bundesgericht 12.1.1989, YCA 1990,0512; **Fouchard/Gaillard/Goldman,** *International Commercial Arbitration, International Commercial Arbitration,* 1999, 986.
[43] OLG Köln 10.6.1976, YCA, 1979,259.
[44] LG Bremen 20.1.1983, YCA XII, 1987,486.
[45] OLG Hamburg 3.4.1975, YCA II, 1977,241; Amsterdamer Berufungsgericht 16.7.1992, XIX Y.B. COM. ARB. 708 1994.
[46] **Born,** *International Commercial Arbitration,* 847.
[47] **Horvath,** *Guerilla Tactics in Arbitration, An Ethical Battle,* in **Klausegger/Klein/Kremslehner/Petsche/ Power/Welser/Zeiler,** *Austrian Yearbook on International Arbitration* 2011,306; **Born,** *International Commercial Arbitration,* 847 with further citations.
[48] The European Convention on International Commercial Arbitration applies in cases of disputes arising out of international commercial activities between natural and legal persons if they – upon conclusion of the agreement – have their usual residence or seat of business in different contractual states.
[49] OGH 20. 10. 1993, 3 Ob 117/93.
[50] **Schwab/Walter,** *Schiedsgerichtsbarkeit*[7] Kap 57 Rz 26 et seq.
[51] **Hausmaninger** in *Fasching/Konecny*[2] § 611 ACCP, Rz 46.

Any such actions are, of course, to be taken under the principle of impartiality and do not mean that Respondent gets additional information unavailable to Claimant.

• Any procedural order, any protocol, any outcome of a gathering of evidence and any notice is also to be served to the defaulting party, both via email – if this is the preferred means of communication – or – to make sure – also via post or courier and return receipt.[53] In any case, a proof that the letter has been duly served has to be kept on file by the arbitral tribunal.

• Just like in "ordinary" proceedings involving cooperating parties, the tribunal may set deadlines for writs, new statements or evidence or requests. The tribunal shall inform both the defaulting party and the cooperating party about any such actions.

• Even if the tribunal does no longer seriously think that the defaulting party will join the proceedings, it shall nevertheless refrain from continuing with the procedural programme too quickly and shall, therefore, also await the defaulting party's deadlines to expire.

• The tribunal shall duly and demonstrably summon the defaulting party to all oral hearings.

• Even if Claimant does not submit a request for an oral hearing, the tribunal might nevertheless consider scheduling such a hearing for reasons of precaution.

• The arbitral tribunal must record the oral hearing most accurately, in case there is a defaulting party from an Anglo-American cultural background, it should also consider having a "word-to-word"-protocol drafted by a "court reporter" to avoid later objections against the method of taking the protocol and for reasons of documentation.

• As regards the gathering of evidence, the tribunal shall also consider the defaulting party's point of view and shall not evaluate the outcome in favour of the other party. However, the tribunal need not apply stricter principles in the evaluation process than those it would apply in "ordinary" proceedings with cooperating parties.

• In case new facts become evident during the proceedings, in particular new statements or new legal aspects, the tribunal must inform Respondent thereof accordingly and give it the chance to comment on such developments, even if this means non-compliance with the before established timetable.

• Any deadlines set forth for Claimant and Respondent are to be equally long and must allow for appropriate reactions to be made, also if time is pressing.[54]

• Should Respondent join the proceedings at a later stage, the tribunal shall – after careful consideration of all circumstances decide upon the validity of potentially elapsed deadlines and writs that were submitted too late. Such an evaluation may also depend upon the fact whether Claimant has submitted new statements at a later stage of the proceedings and if Respondent can give good reason for its default.

Depending on the circumstances, it may also be possible to act with less precaution. The tribunal should, however, also bear in mind that the challenging or non-enforcement of an award does not exactly fly the flag for the competence of the arbitral tribunal – and Claimant's victory will be quite a hollow one.

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[52] OGH 26. 1. 2005, 3 Ob 221/04 b; OGH 20. 10. 1993, 3 Ob 117/93; **Kaiser,** *Das europäische Übereinkommen über die internationale Handelschiedsgerichtsbarkeit vom 21.April 1961,* 1977, 176 ff.

[53] **Jahnel/Vàzquez Pozón,** *Specific Issues Regarding the Recognition and Enforcement of Foreign Arbitral Awards in Spain: Can Arbitrators still Use Registered Letters with Acknowledgment of Receipt,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Yearbook on International Arbitration 2009,* 435 et seq.

[54] **Welser/Klausegger,** *Fast track arbitration: Just fast or something different?,* in: **Klausegger/Klein/ Kremslehner/Petsche/ Power/Welser/Zeiler,** *Austrian Yearbook on International Arbitration 2009,* 259 et seq; **Fiebinger/Gregorich,** *Arbitration in Acid: Fast Track Arbitration in Austria from a Practical Perspective,* in **Klausegger/Klein/ Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Arbitration Yearbook 2008,* 237 et seq; **Steindl,** *The Development of Due Process Under the New York Convention,* in **Klausegger/Klein/Kremslehner/Petsche/Power/Welser/Zeiler,** *Austrian Yearbook on International Arbitration 2008,* 255 et seq.